
Litigants in Person

Key points

The ‘litigant in person’

In March 2013 the Master of the Rolls issued a Practice Guidance¹ which determined that the term ‘Litigant in Person’ should continue to be the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf. The Practice Guidance applies to all proceedings in all criminal, civil and family courts (though not curiously to tribunal proceedings), For the purposes of clarity, the term ‘litigant in person’ (as opposed to ‘self-represented litigant’ or ‘unrepresented party’) is used in this chapter in line with the Practice Guidance both to those appearing unrepresented in courts and also in tribunals. The term encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing and those wishing to enforce a judgment or to appeal.

- Most litigants in person are stressed and worried, operating in an alien environment in what for them is a foreign language. They are trying to grasp concepts of law and procedure about which they may be totally ignorant.
- They may well be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. The outcome of the case may have a profound effect and long-term consequences upon their life.
- They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Role of the judge

- Judges must be aware of the feelings and difficulties experienced by litigants in person and be ready and able to help them, especially if a represented party is being oppressive or aggressive.
- Maintaining patience and an even-handed approach is also important where the litigant in person is being oppressive or aggressive towards another party or its representative or towards the court or tribunal. The judge should, however, remain understanding so far as possible as to what might lie behind their behaviour.
- Maintaining a balance between assisting and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person’s lack of legal and procedural knowledge, is the key.

Introduction

1. There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer.
2. Many do not qualify for public funding, either financially or because of the nature of their case.
3. Some cannot afford a solicitor and even distrust lawyers.

¹ *Practice Guidance (Terminology for Litigants in Person)* 11 March 2013 [2013] 2 All ER 624

4. Others believe that they will be better at putting their own case across.
5. In December 2012, following a discussion at the Judges' Council about the implications of the expected rise in the number of litigants in person after the implementation of the Government's Legal Aid Reforms on 1 April 2013², a Judicial Working Group³ was formed under the chairmanship of Mr Justice Hickinbottom to consider this issue in the context of the civil and family courts, and the tribunals.
6. The report of the Judicial Working Group was published in July 2013.⁴ The report contains a number of recommendations. These include the training of judicial office-holders on dealing with litigants in person and the provision of coherent, effective and up to date guidance. Two examples of such guidance are annexed to the report, namely draft guidance for judges conducting civil proceedings prepared by His Honour Judge Bailey⁵ and draft guidance for family judges prepared by Alison Russell QC⁶.
7. This chapter aims to identify the difficulties faced (and caused) by litigants in person before, during and after the litigation process, and to provide guidance to judges with a view to ensuring that both parties receive a fair hearing where one or both is not represented by a lawyer. This chapter should be read in conjunction with the draft guidance annexed to the report of the Judicial Working Group.
8. Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal which is concerned to adjudicate in proceedings in which that person is a party. But on the whole those who exercise this personal right find that they are operating in an alien environment. The courts and tribunals have not always been receptive to their needs.
9. 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists'.

Lord Woolf, Access to Justice, Interim Report June 1995

10. 'It is curious that lay litigants have been regarded ... as problems, almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around'.

Prof. John Baldwin, Monitoring the Rise of the Small Claims Limit

11. Litigants in person are likely to experience feelings of fear, ignorance, anger, frustration and bewilderment. They will feel at a profound disadvantage, despite the fact that the outcome may have a profound effect with long-term consequences for their lives. The aim of the judge should be to ensure that the parties leave with the sense that they have been listened to and had a fair hearing – whatever the outcome.

Disadvantages faced

12. The disadvantages faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. For many their perception of the court or tribunal

² *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

³ The Judicial Working Group on Litigants in Person

⁴ The report is available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf

⁵ Annex A

⁶ Annex B

environment will be based on what they have seen on the television and in films. They tend to:

- a. be unfamiliar with the language and specialist vocabulary of legal proceedings;
 - b. have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
 - c. lack objectivity and emotional distance from their case;
 - d. be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
 - e. be ill-informed about the presentation of evidence;
 - f. be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.
13. All these factors have an adverse effect on the preparation and presentation of their case. Equally, there are other litigants in person who are familiar with the requirements of the process.

Numbers

14. The numbers of litigants in person have risen significantly in recent years. Financial constraints and the consequences of the Legal Aid reforms will, inevitably, increase the numbers even further.
 15. The small claims procedure in the county court is designed specifically to assist the public to pursue claims without recourse to legal representation and has created a huge increase in the number of litigants in person. The vast majority of defended civil actions in the county court are dealt with under this procedure. With effect from 1 April 2013 the small claims jurisdiction was increased (subject to certain exceptions in personal injury cases) from claims of up to £5,000, to claims of up to £10,000. Public funding has never been available for small claims.
 16. One of the consequences of the Legal Aid, Sentencing and Offenders Act 2012 is that public funding in civil and family cases is now available in only exceptional circumstances.
 17. Litigants in person also appear with increasing frequency in the Court of Appeal in criminal, civil and family cases. Some have represented themselves at first instance. Others, having had lawyers appear for them in the court below, take their own cases on appeal, often through a withdrawal of public funding after the first instance hearing.
 18. The great majority of people appearing in tribunals are unrepresented.
- Ways to help
19. The aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing.
 20. This means ensuring that:
 - a. the process is (or has been) explained to them in a manner that they can understand;
 - b. they have access to appropriate information (e.g. the rules, practice directions and guidelines – whether from publications or websites);
 - c. they are informed about what is expected of them in ample time for them to comply;

- d. wherever possible they are given sufficient time according to their own needs.

Particular areas of difficulty

21. Litigants in person may face a daunting range of problems of both knowledge and understanding.

Language

22. English or Welsh may not be the first language of the litigant in person in the courts and tribunals of England and Wales and they may have particular difficulties with written English or Welsh. Any papers received from the court or tribunal from the other side may need to be translated. The court or tribunal may need to adjourn in order to ensure that a mutually acceptable interpreter can attend the proceedings to explain to the litigant in person in their own language what is taking place, and to assist in the translation of evidence and submissions.
23. It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, www.google.com/language_tools, though these will not adequately take the place of an interpreter/intermediary where one is needed.

Intellectual range

24. Litigants in person come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Judges should:
- a. be sensitive to literacy problems and be prepared where possible to offer short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents;
 - b. exercise and be seen to exercise considerable patience when litigants in person demonstrate their scant knowledge of law and procedure;
 - c. not interrupt, engage in dialogue, indicate a preliminary view or cut short an argument in the same way that they might with a qualified lawyer.
25. Litigants in person often believe that because they are aggrieved in some way they automatically have a good case. When explaining that there is no case, bear in mind that this will come as a great disappointment to a litigant who will have waited for their day in court for some time.

Information

26. Some litigants in person are unaware of the explanatory leaflets available at the court or of the lists of advice agencies. Citizens Advice may be able to offer assistance with case preparation.⁷
27. Many litigants in person believe that court or tribunal staff are there to give legal advice. Under the Courts Charter court staff can only give information on how a case may be pursued; they cannot give legal advice under any circumstances. This may have to be explained to a litigant in person.

⁷ The Citizens Advice Bureau estimates that as a result of the Legal Aid reforms local advice and community based services will lose over 77% of their public funding.

Before the court or tribunal appearance

Statements of case and witness statements

28. Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:
- a. failing to choose the best cause of action or defence;
 - b. overlooking limitation periods;
 - c. not appreciating that they are witnesses in their own cases;
 - d. failing to file or serve their own witness statements in advance of trial (and not understanding that in consequence they may not be able to give evidence).
29. The potentially considerable impact on litigants in person of the reforms to the Civil Procedure Rules (effective from 1 April 2013) has been acknowledged in the report of the Judicial Working Group in the following terms:
- a. '3.34 One of the twin philosophies underpinning the reforms to the Civil Procedure Rules (CPR) is the need to enforce compliance with rules, practice directions and orders. The overriding objective in CPR 1.1 and the rule governing relief from sanctions in CPR 3.9 have been amended to embed this objective.'
 - b. '3.35 Judges are being encouraged to be rigorous and robust in their application of the rules, emulating the experience of Singapore; and such an approach needs to be uniformly applied to all parties, whether represented or not.⁸ Courts will expect compliance and will be slow to grant relief in the event of a default.'
 - c. '3.36 The challenge is, therefore, to ensure that litigants in person are made fully aware of what is required of them in order that they are able to meet those requirements; and are made equally aware of the likely consequences of non-compliance.'

Directions and court orders

30. Litigants in person often do not understand pre-hearing directions (in particular those imposing time deadlines and 'unless orders') or the effect of court or tribunal orders so:
- a. ensure that they leave a directions hearing appreciating exactly what is required of them;
 - b. involve them in the process of giving those directions (e.g. asking them how much time they need to take a particular step and why) so that they realise that the directions relate to the conduct of their own case;
 - c. explain fully the precise meaning of any particular direction or court order.
31. Sometimes litigants in person believe that if the other side has failed to comply with such directions then that in itself is evidence in support of their own case, or the opponent should be prevented from defending or proceeding further. They often feel upset at what they regard as an over-tolerant attitude by the court or tribunal to delays by solicitors. The reasons for any decision, therefore, concerning a failure to comply with a direction should be carefully explained.

⁸ As stressed by the Court of Appeal in *Tinkler v Elliott*, [2012] EWCA Civ 1289 at [32]

Documentary evidence

32. A common problem is lack of understanding about the use and application of documents and bundles. Experience shows that litigants in person:
 - a. tend not to make sufficient use of documentary or photographic evidence in their cases;
 - b. fail to appreciate the need for maps and plans of any location relevant to the case.
33. Case management hearings represent an opportunity to give guidance on these matters.

Disclosure of documents

34. The duty to disclose documents is frequently neglected by litigants in person
 - a. Some will have little or no appreciation that they should adopt a 'cards on the table' approach. Consequently there can be delay, either because of the need to adjourn or because the judge or the other side requires time at the hearing to read recently disclosed documents.
 - b. When a pre-trial or case management hearing takes place, a short clear explanation of the duty of disclosure and the test as to whether or not a document needs to be disclosed helps both parties and the court in terms of time saved.

Preparing bundles

35. Many litigants in person do not have access to office facilities and have difficulties in photocopying documents, preparing bundles and typing witness statements. They have little concept of the need for documents to be in chronological order and paginated. Clear explanations as to what is required at case management hearings should help with this. However, putting the case back is often the sensible course to take, in the event of litigants coming to court with their bundles in other than proper order.

Producing documents

36. All too often litigants in person do not bring relevant documents with them to the hearing. The court or tribunal is faced with the comment: 'I can produce it – it is at home', but it is then too late and an adjournment is likely to be expensive and will usually be refused.
37. The party should have been warned in advance not only to disclose relevant documents to the other side but to bring the originals to the hearing.

Sources of law

38. Most litigants in person do not have access to legal textbooks or libraries where such textbooks are available and may not be able to download information from a legal website. In some circumstances it will be sensible to let an individual, accompanied by a member of the court or tribunal staff, have access to the court or tribunal library (where it exists) or to a particular book.
39. Sometimes litigants in person do not understand the role of case law and are confused by the fact that the judge or tribunal appears to be referring to someone else's case.
 - a. A brief explanation of the doctrine of precedent will enable a litigant in person to appreciate what is going on and why.

- b. A represented party's lawyer should be told to produce any authorities to be relied on at the latest at the outset of a hearing and preferably, if there has been a case management hearing at which appropriate directions can be given, in advance of the hearing.
- c. A litigant in person must be given proper opportunity to read such authorities and make submissions in relation to them.

Live evidence

40. Judges are often told: 'All you have to do is to ring Mr X and he will confirm what I am saying.' When it is explained that this is not possible, litigants in person may become aggrieved and fail to understand that it is for them to prove their case.
 - a. They should be informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court.
 - b. The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.
41. When there is an application to adjourn, bear in mind that litigants in person may genuinely not have realised just how important the attendance of such witnesses is. If the application is refused a clear explanation should be given.

Adjournments

42. Litigants in person may not appreciate the need to obtain an adjournment if a hearing date presents them with difficulties.
 - a. It is a common misconception that it is sufficient to write to the court or tribunal without consulting the other side, merely asking for the case to be put off to another date, or that no more than a day's notice of such a request is required
 - b. Conversely, litigants in person may find it difficult to understand why cases need to be adjourned if they over-run because of the way in which they or others have presented their cases, or why their cases have not started at the time at which they were listed.

Guilty pleas

43. At the plea stage, where an unrepresented defendant pleads guilty, take great care to ensure that the defendant understands the elements of the offence with which they are charged, especially if there is, on the face of it, potential evidence suggesting that the defendant may have a defence to the charge.

The hearing

44. The judge is a facilitator of justice and may need to assist the litigant in person in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:
 - a. attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
 - b. making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).

Explanations by the judge

45. Basic conventions and rules need to be stated at the start of a hearing.
 - a. The judge's name and the correct mode of address should be clarified.
 - b. Individuals present need to be introduced and their roles explained.
 - c. Mobile phones must be switched off, or at least in silent mode.
 - d. A litigant in person who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.
 - e. The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
 - f. A party may take notes but the law forbids the making of personal tape-recordings (without the express consent of the judge)..
 - g. If the litigant in person needs a short break for personal reasons, they only have to ask.
 - h. The golden rule is that only one person may speak at a time and each side will have a full opportunity to present its case.

Particular difficulties

46. Difficulties often arise for litigants in person in getting to the court, being nervous and incoherent, coping with the jargon used and forms of address. All these issues are addressed in the section on children and vulnerable adults and those on disability.

Purpose of hearing

47. The purpose of a particular hearing may not be understood. For example, the hearing of an application to set aside a judgment may be thought to be one in which the full merits of the case will be argued. The procedure following a successful application should be clearly explained, such as the need to serve the proceedings on the defendant, for a full defence to be filed and directions which may be given thereafter so that the parties know what is going to happen next.

The judge's role

48. It can be hard to strike a balance in assisting a litigant in person in an adversarial system. A litigant in person may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.
 - a. Explain the judge's role during the hearing.
 - b. If you are doing something which might be perceived to be unfair or controversial in the mind of the litigant in person, explain precisely what you are doing and why.
 - c. Adopt to the extent necessary an inquisitorial role to enable the litigant in person fully to present their case (but not in such a way as to appear to give the litigant in person an undue advantage).

The real issues

49. Many litigants in person will not appreciate the real issues in the case. For example, a litigant might come to the court or tribunal believing that they are not liable under a contract because it is not in writing, or that they can win the case upon establishing that the defendant failed to take care when the real issue in the case is whether or not the defendant's negligence caused the loss.
50. At the start of any hearing it is vital to identify and if possible establish agreement as to the issues to be tried so that all parties proceed on this basis. Time spent in this way can shorten the length of proceedings considerably.

Compromise

51. Litigants in person may not know how to compromise or even that they are allowed to speak to the other side with a view to trying to reach a compromise.
 - a. Tell them, particularly in civil proceedings, that the role of the court is dispute resolution – explanations as to forms of alternative dispute resolution (ADR) may be appropriate.
 - b. Ask them whether they have tried to resolve their differences by negotiation and, if possible, spell out the best and worst possible outcomes at the outset. This can lead to movement away from the idea that to negotiate is a sign of weakness.
 - c. Remind them to tell the court in advance if their case has been settled.

Advocacy

52. Often litigants in person phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. Explain the difference between evidence and submissions, and help them put across a point in question form.
53. Litigants in person frequently have difficulty in understanding that merely because there is a different version of events to their own, this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not true as an accusation of lying. Be ready to explain that this is not automatically so.
54. Where one party is represented, invite this advocate to make final submissions first, so that a litigant in person can see how it should be done.

Criminal cases

55. Under Article 6(3) of the European Convention of Human Rights (Sch 1, Human Rights Act 1998), everyone charged with a criminal offence has the right to defend him or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.
56. Those who dispense with legal assistance do so usually because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial. This, a defendant is entitled to do. However, guidance as to the value of representation may persuade such defendants that they are better advised to retain their representatives. If a defendant decides, notwithstanding advice and guidance, to represent his or herself, then the judge must explain the process and ensure proper control over the proceedings is maintained.

Cross-examination

57. Throughout a trial a judge must be ready to assist a defendant in the conduct of their case. This is particularly so when the defendant is examining or cross-examining witnesses and giving evidence:
- a. Always ask the defendant whether they wish to call any witnesses.
 - b. Be ready to restrain unnecessary, intimidating or humiliating cross-examination.
 - c. Be prepared to discuss the course of proceedings with the defendant in the absence of the jury before they embark on any cross-examination.
 - d. Note the statutory prohibitions on cross-examination by an unrepresented defendant.

Conduct of the defence

58. Paragraph IV.44.5 of the Consolidated Criminal Practice Direction 2011 puts a duty on a judge to address an unrepresented defendant at the conclusion of the evidence for the prosecution and in the presence of the jury as follows:

‘You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?’

Summing up

59. In the course of summing up a case to a jury in which the defendant is unrepresented, tell the jury that it was always open to defendants to represent themselves and that the jury should bear in mind the difficulty for defendants in properly presenting their case. In some cases, such comments may be more appropriate at the outset.

Adjournments

60. Sometimes a defendant in a criminal case becomes an unrepresented party during the case either by reason of the defendant’s representatives withdrawing or because they are dismissed by the defendant.
- a. Bear in mind that you may exercise your discretion in deciding whether or not to grant an adjournment to enable fresh legal representatives to be instructed.
 - b. That decision should be based on what is in the interests of justice having regard to the interests of the witnesses, the public and the defendant, the stage reached in the trial and the likely ability of the defendant to conduct the defence case properly.
 - c. Bear in mind also the duty to warn a defendant against any course that might not be in that defendant’s best interests, but if the defendant decides to go on alone, allow them to do so.

Assistance, representation and ‘McKenzie friends’

61. The term ‘McKenzie friend’⁹ refers to an individual (whether lawyer or not) who assists in presenting the case in a courtroom by taking notes, quietly making suggestions or giving advice. The role differs from that of advocate in that the McKenzie friend does not address the court or examine any witnesses and is generally permitted at trials or full hearings although the ‘friend’ may not be permitted to perform that role if unsuitable (e.g. someone who is pursuing their own or an unsuitable agenda). It may be less appropriate to allow such assistance in private (chambers) hearings because the judge generally then provides more assistance to a litigant in person.
62. A McKenzie friend may not act as the agent of the litigant in relation to the proceedings nor manage the case outside court (e.g. by signing court documents). A party to civil or family proceedings may wish to be assisted by a ‘friend’ at a hearing or even represented by a person without rights of audience. In several tribunals, lay and unqualified representatives may represent people in, for example, Employment Tribunals.
63. In a climate where legal aid is virtually unobtainable and lawyers disproportionately expensive, the McKenzie friend and lay representatives make a significant contribution to access to justice. But reported cases tend to concentrate upon reasons why they should not be allowed rather than circumstances where they may be of assistance to a party and the court. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed.
64. Guidance as to the circumstances in which permitting a McKenzie friend in civil and family proceedings will be appropriate, and related advice, can be found in the Practice Guidance (McKenzie Friends: Civil and Family Courts) issued by the Master of the Rolls and the President of the Family Division on 12 July 2010.¹⁰ This is set out in full below.
 - 1) This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts.¹¹ It is issued as guidance (**not** as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends) (No 2) [2008] 1 WLR 2757*, which is now withdrawn.¹² It is

⁹ The term ‘McKenzie Friend’ derives from *McKenzie v McKenzie [1971] P 33*, a decision by the Court of Appeal.

Levine McKenzie, a petitioner in divorce proceedings, lodged an appeal on the basis that the trial judge had denied him the opportunity to receive limited assistance from an Australian barrister, Ian Hanger, who was not qualified to practice in the UK. The judge ruled that Mr Hanger must sit in the public gallery during the hearing, and that he could only advise Mr McKenzie during adjournments. The Court of Appeal subsequently ruled that the trial judge’s decision had denied Mr McKenzie rightful assistance, in the form of taking notes, and quietly making suggestions and advice as the hearing proceeded.

⁹ Paragraph 1(2) of schedule 3 to the Legal Services Act 2007.

¹⁰ [2010] 1 WLR 1881

¹¹ References to the judge or court should be read where proceedings are taking place under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, as a reference to a justices’ clerk or assistant justices’ clerk who is specifically authorised by a justices’ clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the Family Proceedings Courts (Childrens Act 1989) Rules 1991 they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).

¹² *R v Leicester City Justices, ex p Barrow [1991] 260*; *Chauhan v Chauhan [1997] 2FCR 206, CA*; *R v Bow County Court, ex p Pelling [1999] 1 WLR 1807*; *Attorney-General v Purvis [2003] EWHC 3190 (Admin)*; *Clarkson v Gilbert [2000] CP Rep 58*; *Uhbi (t/a United Building & Plumbing Contractors) v Kajla [2002] EWCA Civ 628*; *Re O (Children) (Hearing in*

issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

- 2) Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

- 3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

- 4) MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

Exercising the Right to Reasonable Assistance

- 5) While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.
- 6) A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.
- 7) If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.
- 8) When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.
- 9) Where proceedings are in *closed court*, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.
- 10) The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the

Private: Assistance) [2005] EWCA Civ 759, [2005] 3 WLR 1191; *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] EWHC 1688 (Comm), [2004] 2 Lloyd's Rep 535; *Agassi v Robinson (Inspector of Taxes) (No 2)* [2005] EWCA Civ 1507, [2006] 1 WLR 2126; *Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note* [2008] EWHC 2042 (Fam), [2008] 1 WLR 2743.

court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.

- 11) A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.
- 12) The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:
 - (i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing.
 - (ii) The litigant appears capable of conducting the case without assistance.
 - (iii) The litigant is unrepresented through choice.
 - (iv) The other party is not represented.
 - (v) The proposed MF belongs to an organisation that promotes a particular cause.
 - (vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs.
- 13) A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.
- 14) Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.¹³
- 15) Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.
- 16) Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.
- 17) The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.

¹³ The *Practice Direction Guide to Case Management in Public Law Proceedings* dated April 2008 was replaced by *Practice Direction 12A – Public Law Proceedings Guide to Case Management : April 2010* which supplements Part 12 of the Family Procedure Rules 2010. On 6 June 2013 the President of the Family Division also issued a Pilot Practice Direction 12A (Public Law Outline).

Rights of audience and rights to conduct litigation

- 18) MFs do **not** have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e. a lay individual including a MF), the court grants such rights on a case-by-case basis.¹⁴
- 19) Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.
- 20) Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.
- 21) Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.
- 22) It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.
- 23) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however **only** be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.
- 24) If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.
- 25) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

¹⁴ Legal Services Act 2007, ss 12–19 and Sch 3.

- 26) Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

Remuneration

- 27) Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.
- 28) Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.
- 29) Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.
- 30) Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).

Personal Support Unit & Citizen's Advice Bureau

- 31) Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at <mailto://cbps@bello.co.uk> or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

Rights of audience

65. Rights of audience are governed by Part 3 of the Legal Services Act 2007 which came into force on 1 January 2010. The current position is helpfully summarised in the report of the Judicial Working Group on Litigants in Person in the following terms:

- 6.5 Where the litigant in person wishes a lay person to conduct the litigation, or act as their advocate, different issues arise. The rights to conduct litigation and to act as an advocate are governed by the Legal Services Act 2007. Under that Act, both rights are restricted to professional lawyers whose professional body authorises them to act as advocates. Other than litigants in person themselves (who are the subject of a specific exemption), under the Parliamentary scheme lay persons can neither conduct litigation nor act as advocates for litigants in person; nor has a litigant in person any right to receive such assistance or to authorise such a lay person to act in such a way under a power of attorney.¹⁵
- 6.6 However, prior to statutory intervention in this field, the court had inherent power to allow any individual to act as an advocate before it in relation to a particular case. That power is maintained in the 2007 Act, by exempting the rigorous requirements of the

¹⁵ *Gregory & Another v Turner & Another* [2003] 1 WLR 1149

statutory scheme for “a person who has a right of audience granted by that court in relation to those proceedings”.¹⁶

- 6.7 Nevertheless, as it is clear from the 2007 Act and its predecessors that Parliament wishes, ordinarily, to restrict the right to act as an advocate to professionals, the courts have adopted a cautious approach to allowing lay assistants to be advocates in any case, although they have in practice been more flexible since the advent of the CPR.
- 6.8 Generally, the practice has been that where it will be beneficial to the fair and just determination of a case to have a lay person conduct a hearing on behalf of a litigant in person, then the right is granted in the interests of justice. However, there has in recent years been a substantial increase in “professional” lay advocates who, without the requisite training or regulation of a professional lawyer, seek to act as advocates for litigants in person in court on the payment of a fee. Some of these representatives charge fees which are similar if not more than those of a professional lawyer. Some are unable effectively to represent the litigant. Some are positively disruptive to the proceedings.
- 6.9 The courts have a similar power to allow lay persons to conduct litigation for litigants in person. Although, undoubtedly, litigants in person, without doubt, often have assistance in preparing their case, the power to allow a lay person to conduct litigation is very infrequently exercised, for obvious good reason; such individuals are not legally trained, they owe no obligations derived from professional regulation, and they do not owe any obligation to the court.¹⁷ These requirements are generally essential for the protection of other parties and to the proper administration of justice.
- 6.10 The representation of those acting in person has developed differently in the tribunal system, where the statutory constraints do not apply. Generally, lay representatives are far more frequent, often speaking for and even acting for an individual. These lay representatives are often from a charity or other voluntary organisation, which provide a vital resource to individuals in the tribunal system who would otherwise be without any support in often technical areas.

66. The following helpful guidance as to the practical approach to applications by litigants in person to be allowed a lay advocate, including information a court may require to enable it to make a properly informed decision on whether to grant a lay person the right to speak, is set out in the judgment of Mr Justice Hickinbottom in *Graham v Eltham Conservative & Unionist Club and Ors*¹⁸ :

31. In exercising the discretion to grant a lay person the right of audience, the authorities stress the need for the courts to respect the will of Parliament, which is that, ordinarily, leaving aside litigants in person who have a right to represent themselves, advocates will be restricted to those who are subject to the statutory scheme of regulation (Clarkson v Gilbert [2000] 2 FLR 839, D v S especially at page 728F per Lord Woolf MR, and Paragon Finance plc v Noueri (Practice Note) [2001] EWCA Civ 1402; [2001] 1 WLR 2357 at [53] and following per Brooke LJ). The intention of Parliament is firm and clear. Section 1(1) of the 2007 Act sets out a series of ‘statutory objectives’ which includes ensuring that those conducting advocacy adhere to various ‘professional principles’, maintained by the

¹⁶ Paragraph 1(2) of schedule 3 to the Legal Services Act 2007.

¹⁷ This has been underlined by the Court of Appeal’s recent decision in *Re H (Children)* [2012].EWCA Civ 1797

¹⁸ [2013] EWHC 979 (QB)

rigours of the regulatory scheme for which the Act provides, and without which it is considered lay individuals should not ordinarily be allowed to be advocates for others, appoint [*sic*] also emphasised by the Practice Guidance (at paragraph 19). This strength of this interest and will is enforced by (i) legislative provisions allowing lay representation in types of claim in which such representation is considered appropriate, e.g. in small claims in the county court (section 11 of the 1990 Act which is unaffected by the 2007 Act, and the Lay Representatives (Rights of Audience) Order 1999 (SI 1999 No 1225), and (ii) the fact that to do any act in purported exercise of a right of audience when none has been conferred is both a contempt of court and a criminal offence (see sections 14-17 of the 2007 Act).

32. Consequently, it has been said by the higher courts that “the discretion to grant rights of audience to individuals who did not meet the stringent requirements of the Act should only be exercised in exceptional circumstances”, and, in particular, “the courts should pause long before granting rights to individuals who [make] a practice of seeking to represent otherwise unrepresented litigants” (Paragon Finance at [54] per Brooke LJ, paraphrasing comments of Lord Woolf in D v S). In D v S, Lord Woolf indicated (at page 728F) that it would be “monstrously inappropriate” and totally out of accord with the spirit of the legislation habitually to allow lay advocates. The Practice Guidance, in more measured terms, states that:
- “Courts should be slow to grant an application from a litigant for a right of audience... to any lay person.... Any application... should... be considered very carefully.... Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.”
33. Of course, in line with the overriding objective of dealing with cases justly (CPR Rule 1.1), the court will be more open to exercising its discretion and granting a right of audience in a particular case when it is persuaded it will be of assistance to the case as a whole if a litigant in person were to have someone who is not an authorised advocate to speak for him or her. That will especially be so if the litigant in person is vulnerable, unacquainted with legal proceedings or suffering from particular anxiety about the case he or she is conducting. As a result, courts have in practice become more flexible about allowing litigants in person to have assistance at a hearing. In particular, they do not infrequently allow a relative or friend to speak on a party’s behalf. Often, that relative or friend is well-attuned to the party’s case and wishes, and puts the matter more articulately and coherently than the party could himself or herself. As a result, the hearing can become more focused, more efficient and shorter. Such flexibility has become more important as the result of legal aid reforms (including those in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 1 April 2013), which have resulted in a very substantial reduction in those entitled to public assistance and hence a substantial increase in litigants in person who now appear before the courts.
34. However, even though the legal world has in many ways moved on since the time of the authorities to which I have referred, in my view, as those authorities and the Practice Guidance stress, due deference to the will of Parliament, and general caution, are still required.
35. Therefore, as required by the Practice Guidance (paragraph 24), without undue formality, when a litigant in person wishes to be heard by way of a lay advocate, he should make an appropriate application to the court at the first inter partes hearing. The application should be made by the litigant in person, and not by the person who he or she wishes to be the advocate: although, often, in practice that other person may in fact

be heard on the application. The application should be *inter partes*, to enable any opponent who may have objections to raise them. Generally, once the right to appear as an advocate has been given to lay person, that right will extend to all hearings in that claim, unless specifically directed otherwise or the right is revoked. The court may always revoke the right, any decision to revoke being informed by the same principles that apply to the grant of the right. It may, for example, be appropriate to revoke the right if, contrary to hopes and expectations, the lay advocate proves unhelpful or even positively disruptive.

36. The authorities and Practice Guidance provide little assistance with regard to how the court's discretion should be exercised; and this is an area in respect of which the Head of Civil Justice may wish to consider giving further guidance in due course.
37. However, in the meantime, it seems to me that at any application, to put the court into a position to make an informed decision, the court will wish to be provided [*sic*] with information as to (i) the relationship, if any, between the litigant in person and the proposed advocate, including whether the relationship is a commercial one; (ii) the reasons why the litigant wishes the proposed advocate to speak on his behalf, including any particular difficulties the litigant in person might have in presenting his own case; (iii) the experience, if any, the proposed advocate has had in presenting cases to a court; and (iv) any court orders that might be relevant to the appropriateness of the proposed advocate (e.g. orders made against him or her acting in person or as an advocate in previous proceedings, including any orders restraining him or her from conducting litigation or from acting as an advocate). Given the importance of the role of advocate, there is a duty of frankness on both the litigant in person and the proposed advocate in relation to these issues. Such enquiries will usually take only a short time, but they are essential to ensure that proper respect is given to the principle that, ordinarily, advocates should be restricted to regulated advocates and litigants in person.
38. As with the exercise of any power, whether a lay person is given the right to be an advocate in a particular case or for a particular hearing will depend upon all of the circumstances. However, as I have indicated, given the overriding objective, the court will take particular account of the extent to which allowing the individual to speak will assist the fair and just disposal of the case. The Practice Guidance stresses (at paragraph 22) that the burden of showing that it is in the interests of justice for a lay person to be granted the right to be an advocate at a hearing lies upon the litigant who wishes him to do so. It will only be granted in 'special circumstances'. Paragraph 21 of the Practice Guidance gives examples of the type of special circumstances which in the past have been held to justify the grant of a right of audience to a lay person, as follows: (i) that person is a close relative of the litigant; (ii) health problems which preclude the litigant from addressing the court or from conducting litigation, and the litigant cannot afford to pay for professional representation, and (iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings. Those examples are helpful in indicating the sort of exceptional circumstances in which a grant will be made. The Guidance makes clear that those who represent litigants professionally or regularly will only be granted the right in "exceptional circumstances" (paragraph 23).

Small Claims

67. Under section 11 of the Courts and Legal Services Act 1990 the Lord Chancellor authorised the Lay Representatives [Rights of Audience] Order 1999.¹⁹ This is also set out in CPR 27 PD 3.2 (2). This Order survives the 2007 Act coming into force. It authorises lay representatives to appear in small claims. It provides that a lay representative may not exercise any right of audience (1) where the party fails to attend the hearing, (2) at any stage after judgment, or (3) on any appeal. The court has discretion to hear a lay representative even in any of these circumstances but granting a right to appear in an excluded case would require reasons. A lay representative exercising this right may be restricted if unruly, misleads the court or demonstrates unsuitability.

Housing Authority Officers and Employees of Arms Length Management Organisations [ALMOs]

68. Sections 60 and 60A of the County Courts Act 1984 give a right of audience, where proceedings are brought by a local authority, to an authorised officer of that authority. This is restricted to housing claims in the County Court.
69. Employees of ALMOs do not fall under these sections. They now come within s.191 of the 2007 Act. Section 191 (3) defines the specific housing proceedings and appearance is only allowed before a District Judge. An employee must have written authorisation to appear. The employee has a right of audience and a right to conduct litigation.

Companies

70. An employee may represent the company at a fast-track or multi-track interlocutory or final hearing, provided the employee has been authorised by the company to appear and the court gives permission : CPR 39.6
71. Guidance as to the exercise of this power is set out in CPR PD 39A 5.3. There would have to be good reason to refuse. A decision to allow or refuse should be recorded in writing.
72. This does not apply to small claims, any officer or employee may represent the company on a small claim: CPR 27 PD 3.2 (4).

Official Receivers

73. Rule 7.52 of the Insolvency Rules 1986 gives Official Receivers a right of audience in both the High Court and a county court.

European Lawyers

74. Paragraph 1 of Schedule 3 to the Legal Services Act 2007 is expressed as being 'subject to paragraph 7'. Paragraph 7 states that a European lawyer [as defined by the European Communities [Services of Lawyers] Order 1978²⁰ is an exempt person 'for the purposes of carrying on an activity which is a reserved legal activity'.

19 SI 1999/1225

20 SI 1978/1910

Official Solicitor

75. The Official Solicitor represents parties to proceedings who lack capacity to conduct litigation ('protected parties') or who are deceased or unascertained when no other suitable person or agency is able and willing to do so in civil courts. The purpose is to prevent a possible denial of justice and safeguard the welfare, property or status of the party.
76. He usually becomes formally involved when appointed by the Court, and may act as his own solicitor, or instruct a private firm of solicitors to act for him.

Representing adults who lack capacity

77. An order directing the Official Solicitor to act as a legal representative in a civil court for a protected party will either be made with his prior consent or only take effect if his consent is obtained.
78. Before the Official Solicitor will agree to act on behalf of a protected party in proceedings three requirements must be met:
 - a. Evidence that the adult lacks capacity (this does not of course apply in the case of a child).
 - b. There must be nobody else suitable and willing to act.

The Official Solicitor is the litigation friend of last resort so he can only act where there is no one else suitable and willing to act. It is better for a person who knows the protected party, such as a relative or friend, to act as litigation friend. Therefore all possible candidates should be considered and approached if suitable.
 - c. Cover for the Official Solicitor's costs.

The Official Solicitor does not charge for acting as litigation friend, but does require funding for the costs of instructing solicitors to act in the litigation, or for his own charges where he also acts as solicitor. The Official Solicitor is not funded to subsidise private litigation and will only consent to act in a particular case if his costs are guaranteed from the outset. Where the Official Solicitor is asked to act for a defendant and there is no other method of funding his costs of obtaining legal representation, he will require an undertaking from the claimant to meet his costs.

Contacting the Official Solicitor

Enquiries and requests for assistance are frequently made by the judiciary and members of the legal profession. The Official Solicitor can be contacted at:

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London WC2A 1DD
DX 0012 London/Chancery Lane WC2
Tel.: 020 7911 7127 Fax.: 020 7911 7105
Email: enquiries@offsol.gsi.gov.uk